

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0018-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOHN EDWARD SZABO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200200889

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

John Edward Szabo

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner John Szabo seeks review of the trial court's order summarily dismissing his successive notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pursuant to a plea agreement, Szabo was convicted of two counts of attempted sexual conduct with a minor, designated as dangerous crimes against children. The trial court sentenced him to consecutive prison terms totaling thirty years. Szabo filed a petition for post-conviction relief and, in November 2005, the trial court denied relief on all but one claim, granting his request for resentencing. In December 2005, the court modified Szabo's sentence to reflect that he would be eligible for release after serving at least half the sentence imposed. The court additionally ordered that Szabo had thirty days to file a petition for review with this court. Szabo did not do so, but several years later filed a petition for post-conviction relief asserting he had failed to file a petition for review due to ineffective assistance of counsel. The court granted Szabo leave to file a delayed petition for review from the December order, but otherwise denied relief. Szabo then filed a petition for review requesting that we review the court's November 2005 denial of his claims. Because the court had granted Szabo leave to seek review only of the December 2005 order, we determined Szabo's petition for review was untimely and denied review. *State v. Szabo*, No. 2 CA-CR 2010-0030-PR, ¶ 4 (memorandum decision issued Apr. 29, 2010).

¶3 In November 2010, Szabo filed a third notice of post-conviction relief asserting that, although he had failed to file a timely successive notice of post-conviction

relief, it was “without fault on [his] part.” He asserted he had only recently received his case file and therefore was “only now able to discover and bring forth this claim.” He argued the trial court had improperly enhanced his sentenced based on former A.R.S. § 13-604.01,¹ dangerous crimes against children, without requiring the state to prove beyond a reasonable doubt “an additional element to trigger” that enhancement. He further asserted that his claim was of sufficient constitutional magnitude that it required a knowing, voluntary, and intelligent waiver, and that he had not waived the claim. The trial court summarily dismissed his notice, concluding Szabo had failed to “state meritorious reasons substantiating the claim.”

¶4 In his petition for review, Szabo argues the trial court erred in summarily dismissing his notice, asserting his claim “cannot be precluded” because the claim is of sufficient constitutional magnitude to require a knowing, voluntary, and intelligent waiver, and that he had not made such a waiver. *See Stewart v. Smith*, 202 Ariz. 446, ¶¶ 10, 12, 46 P.3d 1067, 1071 (2002) (Rule 32.2(a)(3) does not preclude claims of “sufficient constitutional magnitude” unless defendant knowingly, voluntarily, and intelligently waived right underlying claim). But Szabo misapprehends the basis of the court’s ruling. It did not find his claim precluded pursuant to Rule 32.2(a). Rather, it first determined his claim was not subject to preclusion under Rule 32.2(a) or the

¹The version of § 13-604.01 in effect at the time of Szabo’s offenses provided that a defendant convicted of attempted sexual conduct with a minor under fifteen years of age is guilty of a class three felony with a presumptive ten-year prison term that could be adjusted by five years based on aggravating or mitigating factors. 1993 Ariz. Sess. Laws, ch. 33, § 1; 1987 Ariz. Sess. Laws, ch. 307, § 4.

timeliness requirement of Rule 32.4 because Szabo had raised his claim based on Rule 32.1(f), which provides a ground for relief that is excepted from preclusion and may be raised at any time pursuant to Rule 32.2(b). *See* Ariz. R. Crim. P. 32.1(f) (Rule 32 grounds for relief include that “defendant’s failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant’s part”). The court then determined Szabo had failed to make the showing required by Rule 32.2(b)—that his notice contain “meritorious reasons . . . substantiating the claim.” Whether Szabo’s claim is subject to preclusion was not germane to the court’s analysis.

¶5 The trial court stated Szabo had “allegedly” raised his claims pursuant to Rule 32.1(f) and, as we noted above, rejected his claim because Szabo had not provided “meritorious reasons substantiating” it. That ground for relief, however, by the rule’s plain language, does not apply to successive notices of post-conviction relief; it applies only to an of-right notice of post-conviction relief or to a notice of appeal. Ariz. R. Crim. P. 32.1(f). Accordingly, Szabo was not entitled to relief under that subsection.

¶6 Szabo’s claim is instead properly characterized as a claim pursuant to Rule 32.1(a) or (c). Our mandate in Szabo’s previous Rule 32 proceeding issued on June 21, 2010. His notice of post-conviction relief was not filed until November 18—120 days past the thirty-day time limit of Rule 32.4(a). Thus, as Szabo admitted in his notice of post-conviction relief and his petition for review, his notice was not timely. And, because his claim does not fall within Rule 32.1(d), (e), (f), (g), or (h), no exception to

the time limit of Rule 32.4(a) applies. *See* Ariz. R. Crim. P. 32.2(b). Thus, the court did not err in summarily dismissing his notice of post-conviction relief.

¶7 We grant review but, for the reasons stated, deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge